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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 CUBIC TELECOM LIMITED, as
Assignee of PEREGRINE NETWORK,
13 INC.,

14 Plaintiff,

15 vs.

16 CHENGBEN WANG A/K/A PETER
WANG,

17 Defendant.
18

Case No. 14-cv-02956-EDL

**DEFENDANT CHENGBEN WANG'S
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Hearing: August 4, 2015
Time: 9:00 a.m.
Dept: Courtroom E
Judge: Hon. Elizabeth D. Laporte

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1 **I. INTRODUCTION**

2 While this may be a simple case, as Plaintiff asserts, it is not merely about the supposed
3 promises made on a piece of paper that Cubic Telecom Limited alleges—but has not sufficiently
4 proved—that it owns. Rather, this is about a company not involved in this case, so starving for a
5 quick cash infusion that its leaders said whatever it took to get Defendant Chengben Wang to
6 consider investing. Because a contract based on a lie is no contract at all, the terms of the
7 fraudulently induced Promissory Note at issue in this action are not enforceable.

8 To prevail at this stage, Cubic must proffer sufficient, admissible evidence to establish
9 that no reasonable jury would believe that Mr. Wang was tricked into a promise by men desperate
10 for his cash. It also must prove that Cubic actually has the right to enforce the Note. Cubic has
11 failed to meet its burden on these issues. Mr. Wang is thus entitled to have a jury determine these
12 issues, and this Court should deny Cubic’s Motion.

13 **II. FACTUAL BACKGROUND**

14 **A. The Parties Have No Direct Relationship.**

15 Mr. Wang is a self-made businessman, now retired, who primarily focused on the
16 management of real estate development. Declaration of Chengben Wang (“Wang Decl.”) ¶ 2.
17 Prior to the dealings that gave rise to this case, Mr. Wang had little or no experience with the sale
18 of stock, high-tech/information technology companies, or startup financing. *Id.* ¶ 2. Mr. Wang is
19 73 years old. He has poor eyesight. He grew up in China. And while fluent in English, Mr.
20 Wang sometimes struggles to overcome language and cultural barriers that stand between him
21 and native-English speakers. *Id.* ¶ 3.

22 Mr. Wang has no idea what Cubic does. He has never dealt with the company. Until
23 October 2013, when out of the blue Cubic threatened to sue him, Mr. Wang had never even heard
24 of Cubic. Cubic alleges that it rightfully obtained a Promissory Note that Mr. Wang signed in
25 favor of a third party.

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That third party is Peregrine Network, Inc., a failed Delaware corporation that sought to sell mobile broadband services to laptop and tablet users.¹ It grew out of a related Arizona corporation by the same name, run by the same officers, and fell short of funds needed to operate as a going concern. *See* Declaration of Mark Petersen (“Petersen Decl.”) ¶ 3, Ex. 3 at Cubic000985-91. Cubic tries to trace its ownership of the Note from Peregrine through Qualcomm, Inc. In short, and as described below, Cubic’s only role in this case is that of an unrelated outsider looking to make money off of an elderly man who was duped into signing a promissory note for a dying company by men who told him what they knew he wanted to hear.

B. Peregrine Network, Inc. Falters.

By March 2011, roughly seven months before Mr. Wang came along, Peregrine Network begged its investors for cash, sending an “Investor Update” that warned: “Unless the Company receive [sic] emergency funding by tomorrow . . . the Company will cease operations at close of business Friday . . . due to insolvency.” *Id.* ¶ 3, Ex. 1 at Cubic001440. Peregrine had “aggressively” searched far and wide for a bank loan but had “been rejected as not meeting current commercial lending requirements.” *Id.* at Cubic001443.

But there was hope. Qualcomm Inc. offered to make a \$3 million loan “as a strategic partner.” *Id.* at Cubic001442. As Peregrine explained a month later, it needed to “fully fund” its business to secure Qualcomm’s loan. *Id.* ¶ 3, Ex. 2 at Cubic001447. Negotiations continued for several months, and the Arizona company effectively shifted all of its business operations into the new, Delaware corporation. One thing had not changed, however: Peregrine still needed cash, and quickly. By September 26, 2011, Peregrine was finalizing terms to secure a loan from Qualcomm. Realizing the dim future of a company that by its own admission had been rejected by banks across America, Qualcomm conditioned its \$3 million loan on Peregrine’s ability to

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¹ The company had assumed all business operations of an Arizona-incorporated Peregrine Network, Inc. *See* Declaration of Mark Petersen (“Petersen Decl.”) ¶ 3, Ex. 3 at Cubic000986. For simplicity’s sake, this statement of facts refers to both entities as Peregrine Network or Peregrine.

1 “have sufficient funds to operate for longer than a few weeks.” *Id.* ¶ 3, Ex. 3 at Cubic000983. In
 2 other words, as it explained on September 26, 2011, Peregrine needed money—and a lot of it—by
 3 mid-October or it would effectively close down as an independent company.

4 **C. Peregrine Meets Mr. Wang.**

5 Three days after that solicitation to its investors, Peregrine’s Chairman serendipitously
 6 met Mr. Wang. *See* Wang Decl. ¶ 5, Ex. 1 at PW000028; Petersen Decl. ¶ 6, Ex. 9 (“Wang
 7 Dep.”) at 13:6-7, 14:19-25. The Chairman was John Hendrick, who also was President and Chief
 8 Executive Officer of a medical-device manufacturing company called NeoVista, Inc. Hendrick
 9 and Mr. Wang had had no prior dealings, but Hendrick quickly pitched Mr. Wang to invest in
 10 Peregrine. Wang Decl. ¶ 12, Ex.1 at PW000028; Wang Dep. at 16:1-3. He explained that he
 11 could give Mr. Wang a “good value of a share, good deal.” Wang Dep. at 17:18-19. And he
 12 suggested that investing in Peregrine would give Mr. Wang “a lot of business exposure to other
 13 people in the South Bay.” *Id.* at 17:21-23.

14 Hendrick bolstered the soundness of the investment by explaining that “he [had] a contract
 15 with HP” and by fostering the notion that “it’s a long-time established company.” *Id.* at 20:21-
 16 21:18. In all, everything Hendrick said—including that Peregrine had some type of collaboration
 17 with Qualcomm, Inc.—suggested a viable, healthy company. It was, as Mr. Wang later put it, a
 18 “very believable story.” *Id.* at 21:19-22:2. Mr. Wang responded the next day by offering to
 19 invest \$1 million in the company. But not for nothing: Mr. Wang explained in detail what he
 20 wanted in return.

21 **D. Mr. Wang Asks for Licenses and Other Product-Related Rights; Hendrick**
 22 **Promises Them.**

23 In particular, Mr. Wang initially said he would invest \$1 million in exchange for shares of
 24 Peregrine and “the rights to his products, to produce and market in China with payment of certain
 25 Royalty to you.” Wang Decl. ¶ 12, Ex. 1 at PW000028. He also told Hendrick, who served as
 26 the Chief Executive Officer of a company called NeoVista, Inc., that the investment would be in
 27 exchange for the ability and right both to house China-based manufacturing for a “NeoVista
 28 project” and to market the NeoVista product “during the terms of approval of IP Rights.” *Id.*

1 Hendrick, writing back from a NeoVista e-mail address, explained that Peregrine did “not
 2 have a material product.” *Id.* But he also affirmed that the NeoVista proposal was “highly
 3 doable.” *Id.* Most of Hendrick’s e-mails actually discussed Mr. Wang’s NeoVista proposal—
 4 going so far as expressly committing “to help you set up the operations in China . . . free of
 5 charge.” *Id.* Mr. Wang thanked Hendrick for his promise to help Mr. Wang set up operations in
 6 China. He was so excited at the prospect that he noted that he already was “working on getting
 7 50 patients in China to try your product.” *Id.* Hendrick replied: “I am in agreement that as soon
 8 as we can move into the market I would like to start manufacturing in China with you.” *Id.* at
 9 PW000026. While the details required further discussion, Hendrick promised Mr. Wang that he
 10 “look[s] forward to that.” *Id.*

11 Two days later, and about a week before Mr. Wang signed the Note, Hendrick urged Mr.
 12 Wang to call him on his cell phone. *Id.* at PW000025. Hendrick wanted to discuss “what it
 13 would take to get a profitable business” started “in China with our product.” *Id.* Hendrick hoped
 14 to discuss the particulars in great detail so Mr. Wang could be prepared to move forward. *Id.*
 15 The next day, Mr. Wang wrote that “John Hendrick will let me have rights to manufacture and
 16 market NeoVista product, in China.” *Id.* at PW000023.

17 Hendrick, always writing from his NeoVista e-mail, took the lead on wooing Mr. Wang
 18 on Peregrine’s behalf. *See* Wang Dec. ¶ 7. For example, Peregrine’s general counsel, Mark
 19 Foster, sent Mr. Wang copies of the unexecuted Note and related documents, but he told Mr.
 20 Wang that “John Hendrick will be in touch with you” to discuss them.² *See id.* ¶ 12, Ex. 1 at
 21 PW000024. Throughout their dealings, all of Hendrick’s e-mails to Mr. Wang came from an en
 22 e-mail address ending in “@neovistainc.com.” *See generally, id.* at PW000020-28. And the day
 23 before Mr. Wang signed the note, Hendrick wrote to Mr. Wang and asked when the two could
 24 talk to “finalize” the deal, signing his e-mail as “President & CEO” of “Neovista, Inc.” *See id.* ¶
 25 14, Ex. 3 at PW000982.

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 28 ² Foster’s correspondence to Mr. Wang came, as it always did, from a Peregrine e-mail address.
See generally Wang Decl. ¶ 12, Ex. 1 at PW000020-28.

1 In Mr. Wang's mind, Peregrine and NeoVista were one and the same, and his willingness
 2 to invest was precisely because of the total package he understood he was getting. *See* Wang
 3 Dep. at 16:8-18, 18:12-19:15, 24:17-23, 28:1-16, 35:19-25, 62:1-62:25, 81:22-82:12, 86:2-18,
 4 100:12-101:8, 111:8-18; Wang Decl. ¶¶ 7-11. And, because Hendrick had discussed China so
 5 much, including discussions about providing free equipment for Mr. Wang to use, Mr. Wang
 6 clearly understood he was going to get an agreement to produce and sell the Peregrine and
 7 NeoVista products and services in China. *See* Wang Dep. at 25:18-26:3, 27:8-15, 41:1-12, 84:12-
 8 15, 112:8-113:7.

9 **E. Peregrine Conceals Material Facts About Its Financial Health.**

10 Hendrick and Peregrine said a lot to Mr. Wang, especially about NeoVista and operations
 11 in China. *Id.* But they did not tell him that Peregrine was falling apart. They did not share with
 12 Mr. Wang, for example, the information in the prior Investor Updates. Mr. Wang had never even
 13 seen those updates before signing the Note. Wang Decl. ¶ 21. So neither Hendrick nor anyone
 14 else at Peregrine ever told Mr. Wang that Peregrine had very recently, and repeatedly, been mere
 15 days away from shutting down. Mr. Wang was also unaware, because Peregrine hid it from him,
 16 that banks had rejected the company left and right as an unfit borrower. *See* Petersen Decl. ¶ 3,
 17 Ex. 1 at Cubic001443 (“[D]espite having aggressively solicited commercial loans nationwide,
 18 Peregrine has been rejected as not meeting current commercial lending requirements.”). Mr.
 19 Wang only vaguely was aware that Qualcomm had provided some type of financing to Peregrine,
 20 the terms of which required him to pledge his Peregrine shares to Qualcomm. *See* Wang Dep. at
 21 30:14-20. But Peregrine officers never explained *why* that financing was so critical to the
 22 company. Mr. Wang had believed the financing was more of a partnership, not least because
 23 Hendrick had depicted the loan as such a good thing. *Id.* at 20:21-22:2. But Mr. Wang had no
 24 idea that the company was on the brink of collapse. *See* Wang Decl. ¶¶ 23-25. In short, Hendrick
 25 and Peregrine hid from Mr. Wang the fact that their company was about to expire.

26 Meanwhile, Peregrine needed to make good on its obligations to Qualcomm. On October
 27 6, 2011, the two companies amended the terms of Qualcomm's loan, under which, as Peregrine
 28 later told its investors, Peregrine needed \$500,000 by October 15, 2011, and an additional \$1.7

1 million by November 30, 2011. *See* Petersen Decl. ¶ 3, Ex. 6 at Cubic000960. The day after
 2 finalizing the amendments to the Qualcomm deal, Hendrick wrote Mr. Wang that “we will need
 3 to get this done by Monday.” *See* Wang Decl. ¶ 13, Ex. 2 at PW000697. He set up a dinner, at
 4 which Mr. Wang would sign the Promissory Note. *Id.*

5 Thus, on the evening of October 11, 2011, Mr. Wang met Hendrick and Foster,
 6 Peregrine’s attorney, to sign the Note at a busy restaurant. They brought the Note. And,
 7 surrounded by the clatter of fellow diners, encouraged by the men’s representations and promises,
 8 and not, of course, dissuaded by the damning facts they had concealed from him, Mr. Wang
 9 signed. Wang Dep. at 29:4-13. Mr. Wang could not quite make out the document’s wording, not
 10 least because he had forgotten to bring his glasses. *Id.* But Mr. Wang trusted Hendrick, who had
 11 told him much about NeoVista and about licensing and about China. And Hendrick knew that
 12 Mr. Wang trusted him. Just about a week before, Mr. Wang had written:

13 John, since I have met you and known you, I feel great about you.
 14 You are the only person that is trust worthy [sic] in the high tech
 15 industry. You’ve kept your promises, whether you said seriously
 or casually. I want to be your friend and associate with you in
 business.

16 Wang Decl. ¶ 12, Ex. 1 at PW000028.

17 **F. Mr. Wang Promotes Peregrine and NeoVista Products in China.**

18 As a result of Mr. Wang’s understanding of his deal, supported by Hendrick’s willingness
 19 to play along, Mr. Wang believed he would be working with both Peregrine and NeoVista to sell
 20 their products and services in China. *See* Wang. Decl. ¶¶ 7-11; Wang Dep. at 18:12-19:8. He
 21 began to discuss the products with his business and personal contacts in China. For example, he
 22 spoke with friends in China about Peregrine’s mobile-broadband service in early December 2011.
 23 *See* Wang Decl. ¶ 16, Ex. 4 at PW001315; *see also id.* ¶ 15. Mr. Wang shared this friend’s
 24 concerns about Peregrine’s network with Hendrick and Foster. *Id.* ¶ 16, Ex. 4 at PW001315.
 25 Foster also previously had sent Mr. Wang some information related to “medical device
 26 conference,” which would relate to the NeoVista line of business. *Id.*

27 Likewise, on December 15, 2011, Mr. Wang e-mailed Hendrick specifically to discuss
 28 meetings Mr. Wang had just concluded in China. Wang. Decl. ¶ 17, Ex. 5 at PW001335-36. Mr.

1 Wang had discussed NeoVista’s product with the Chinese State Food and Drug Administration
 2 (“SFDA”), which explained to Mr. Wang how he would have to proceed to import and produce
 3 NeoVista’s medical devices. *See id.* In that same e-mail, Mr. Wang shared that he had discussed
 4 Peregrine’s product and services with other people in Beijing, and promised to report back “of
 5 what we can do with the said product” there. *Id.*

6 Just two months before, Hendrick gushed over Mr. Wang’s proposals regarding the
 7 Chinese market for NeoVista and Peregrine. Now, having gotten from Mr. Wang what he
 8 needed, Hendrick kept it short: “[G]ood to hear from you. . . [S]tay warm. . . . [C]all when you
 9 can.” *Id.* They never spoke about the Chinese market for either product again. Wang Decl. ¶ 18.

10 **G. Peregrine Folds; Cubic Eventually Sues.**

11 Meanwhile, Peregrine had been trying to raise the money it needed to satisfy the terms of
 12 its loan from Qualcomm. Having obtained what it needed from Mr. Wang—a fraudulently
 13 secured agreement to invest \$500,000—Peregrine tried to use the Note to entice its investors and
 14 potential investors to provide additional funds. *See* Wang Decl. ¶ 20, Ex. 7 at PW001364-66.
 15 The effort failed. On December 5, 2011, Qualcomm sent Peregrine a Notice of Default. Compl.
 16 ¶ 9.

17 So Peregrine was not as Mr. Wang had been led to believe. And it started to become
 18 clear to him that Hendrick, despite his expansive promises, did not intend to enter a deal with Mr.
 19 Wang related to the NeoVista products. *See* Wang Decl. ¶ 18. In short, Mr. Wang began to
 20 understand that he had been duped. Believing now that there was no deal at all, Mr. Wang
 21 concluded that the Note was void and declined to give his money to the men who had misled him.
 22 *See, e.g.,* Dep. at 116:19-25.

23 Cubic alleges that in the following months, Peregrine and Qualcomm negotiated a deal by
 24 which Qualcomm foreclosed on Peregrine’s assets, including the Note, and then sold them to
 25 Cubic. *See* Compl. ¶¶ 10-14. On that basis, Cubic brought this case.

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III. LEGAL STANDARD

The Court can grant Cubic's motion only if Cubic establishes that there is no genuine issue of any material fact and that, as a result, it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In considering the Motion, the Court must review the facts in a light most favorable to Mr. Wang. *State Farm Fire & Cas. Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

IV. EVIDENTIARY OBJECTIONS

Pursuant to Federal Rule of Civil Procedure 56(c)(2) and Local Rule 7-3(a), Mr. Wang objects to the Declaration of Fiona O'Sullivan ("O'Sullivan Decl.") and all the evidence that Cubic seeks to introduce through it. The Declaration fails to provide any basis for nearly all of O'Sullivan's assertions, and she fails to lay any foundation for the attached exhibits.³

Documents that "have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988) (citation omitted). Moreover, a declaration used to support a motion for summary judgment must "show that the . . . declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). It is not enough for a declarant to state that the document attached to her declaration is a "true and correct copy" of the given piece of evidence. *Beyene*, 854 F.2d at 1182.

Cubic failed to lay the foundation for the following exhibits it has offered in support of its Motion for Summary Judgment:

<u>Exhibits & Declarations</u>	<u>Objections</u>
"Notice of Disposition By Private Sale" (Ex. 1 to O'Sullivan Decl.)	Not authenticated (Fed. R. Evid. 901(a)); Lack of personal knowledge (Fed. R. Evid. 602).
Cited in Pl.'s Mot. for Summ. J. ("Cubic Mot.") at 2.	

³ The sole exception is O'Sullivan's assertion that she is a "Legal and Compliance Officer at Cubic Telecom Limited." But it remains unclear what that job entails, how long Ms. O'Sullivan has had the position, and how that position qualifies her to submit a declaration in this case.

1 2 3	“UCC Financing Statement” (Ex. 2 to O’Sullivan Decl.) Cited in Cubic Mot. at 2-3.	Not authenticated (Fed. R. Evid. 901(a)); Lack of personal knowledge (Fed. R. Evid. 602).
4 5 6	“Amended and Restated Foreclosure Sale Agreement” (Ex. 3 to O’Sullivan Decl.) Cited in Cubic Mot. at 3.	Not authenticated (Fed. R. Evid. 901(a)); Lack of personal knowledge (Fed. R. Evid. 602).
7 8 9	“Amended and Restated Bill of Sale” (Ex. 4 to O’Sullivan Decl.) Cited in Cubic Mot. at 3.	Not authenticated (Fed. R. Evid. 901(a)); Lack of personal knowledge (Fed. R. Evid. 602).
10 11 12	“Stock Certificate No. 29” (Ex. 5 to O’Sullivan Decl.) Cited in Cubic Mot. at 5.	Not authenticated (Fed. R. Evid. 901(a)); Lack of personal knowledge (Fed. R. Evid. 602).

O’Sullivan “did not sign the exhibit[s], and [s]he states no facts at all from which [the Court] could conclude that [s]he could identify the signatures of those who did.” *See United States v. Dibble*, 429 F.2d 598, 602 (9th Cir. 1970). She “tells us nothing to show how [s]he knows the document to be a correct copy.” *Id.* “The fact that [O’Sullivan] is employed by [Cubic] and that the [documents were] supposedly signed by somebody who is also [working for Cubic] is patently insufficient to provide [her] with the necessary personal knowledge to authenticate” them it. *Id.* These exhibits cannot support Cubic’s motion.

The same is especially true for the several documents to which Cubic is not even a party. *See* O’Sullivan Decl., Ex. 1 (Notice of Sale, signed only by Qualcomm vice president); Ex. 2 (UCC Financing Statement, not signed by *anyone*, listing only Peregrine and Qualcomm as interested parties); Ex. 4 (Bill of Sale, signed only by a Qualcomm vice president); Ex. 5 (Stock Certificate, signed only by Peregrine executives).

Likewise, O’Sullivan provides no foundation for any of the supporting assertions she makes in paragraphs 2 through 8 of her Declaration. For example, she asserts that

[O]n or about March 15, 2012, Qualcomm issued a Notice of Disposition By Private Sale to Peregrine and other parties as set forth therein (“*Notice of Sale*”). . . . Pursuant to the Notice of Sale, Qualcomm sought to foreclose on certain assets of Peregrine as set forth in Attachment B to the Notice of Sale, including the Note, through a private sale.

O’Sullivan Decl. ¶ 2. O’Sullivan has not explained how she knows this. She does not say how and why she knows what Qualcomm, a company for which she does not (and did not) work, did and when. How can she? She does not work there. Given that the only assertion for which it is apparent she has personal knowledge is her name and title at Cubic, the Court should strike O’Sullivan’s Declaration in its entirety.

V. ARGUMENT

This Court should deny Cubic’s Motion because Cubic has not met its burden on summary judgment. First, Cubic has not provided sufficient evidence—admissible or otherwise—to establish beyond reasonable dispute its right to enforce the Note. Second, triable issues of fact remain as to whether Peregrine’s leaders tricked Mr. Wang into agreeing to invest. Finally, there are also issues of fact about whether Peregrine concealed material facts about the financial health of the company to induce Mr. Wang’s agreement.

A. Cubic Has Not Produced Sufficient Evidence to Support Its Claims.

The Promissory Note is payable to Peregrine Network “or its permitted assigns, transferees and successors.” So, any entity to which Peregrine validly assigned or transferred the Note is a “holder” entitled to enforce it. *See* Del. Code Ann. tit. 6, § 1-201(b)(21) (defining “holder”); *id.* at § 3-301 (providing that holder is entitled to enforce instrument). Cubic has not proved that it holds the note as a result of a valid assignment or transfer.

Cubic alleges that it is Peregrine’s assignee, and that it holds the Note. Compl. ¶¶ 1, 15; see also, Cubic Mot. at 2-3. But Cubic has failed to prove this allegation in support of its Motion. It has not submitted admissible evidence tracing the Note’s assignment or transfer from Peregrine to Qualcomm to Cubic. The only items of potential evidence that Cubic offers on this essential element of its cause of action are the documents for which Declarant O’Sullivan failed to provide any foundation, as shown above. The Court cannot consider those exhibits. And because Cubic

has not offered any other evidence to establish its right to enforce the Note under section 3-301, the Court should deny the Motion.

B. A Jury Could Find That Mr. Wang was Defrauded.

Delaware courts will consider extrinsic evidence to establish whether a party was fraudulently induced into signing a contract. *See, e.g., Carrow v. Arnold*, No. 182-K, 2006 WL 3289582, at *8 (Del. Ch. Oct. 31, 2006). So, even if Cubic had provided sufficient evidence that it is a holder of the Note, Cubic cannot enforce a note that is the product of fraud.⁴ *See, e.g., Grady v. Easley*, 45 Cal. App. 2d 632, 642 (1941) (“One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract.”). The elements of fraud are (1) a false representation, (2) knowledge of that falsity or reckless indifference to the truth, (3) intent to induce another to act, (4) justifiable reliance by the victim, and (5) damages caused by the misrepresentation. *See Vichi v. Koninklijke Philips Elects., N.V.*, 85 A.3d 725, 773-74 (Del. Ch. 2014).

1. Peregrine Made False Promises to Induce Mr. Wang to Sign the Note.

False promises of future conduct or intent generally will not constitute fraudulent representations. *See Carrow*, 2006 WL 3289582, at *8. But even *Carrow* acknowledged that some promises can amount to fraud. *Id.* at *9. Specifically, “a promisor could make an oral promise knowing that, either because of exigencies of time or circumstance, the promisee will not notice or understand if the promise is omitted or changed in the final written agreement.” *Id.*

Those are, in fact, the circumstances of this case. First, pressed by the tight deadline imposed by Qualcomm, Peregrine hounded Mr. Wang to close a deal. Second, throughout the

⁴ A “holder in due course” is not subject to a defense that the obligor was fraudulently induced to sign a negotiable instrument. *See* Del. Code Ann. tit. 6, § 3-305(a)-(b), cmt. 1-2 (a holder in due course is subject to fraud-in-the-execution defenses but not defenses arising from fraudulent inducement). But an entity that is not a holder in due course is subject to any defense against enforcement of a contract. *See id.* at § 3-305(a)(2); *Lore v. Girard Trust Corn Exch. Bank*, 121 A.2d 309, 310 (Del. Super. 1956). Section 3-302(a) provides that “holder in due course” is one who takes note “without notice that the instrument is overdue.” Cubic acknowledges that it knew that the Note had not been paid when Cubic acquired it. *See* Petersen Decl. ¶ 5, Ex. 7 at 3-4. Accordingly, Mr. Wang has the same defenses against Cubic, including fraud in the inducement, that he would have against Peregrine.

1 discussions with Mr. Wang, Hendrick affirmatively peppered his correspondence and
 2 conversations with promises to deliver what Mr. Wang truly sought: the right to make, market
 3 and distribute in China the goods and services of both Peregrine and NeoVista. *See, e.g.*, Wang
 4 Decl. ¶ 12, Ex. 1 at PW000025-28; Wang Dep. at 25:18-26:3, 27:8-15, 41:1-12, 84:12-15, 112:8-
 5 113:7. From start to finish, Peregrine tried to take advantage both of the trusting relationship that
 6 Hendrick had created with Mr. Wang, and of Mr. Wang's understanding of what he was getting in
 7 return for his investment. Practically every time the two men corresponded and spoke, Mr. Wang
 8 was reminded of the NeoVista deal overtly through Hendrick's supportive statements about the
 9 future prospects of a Chinese market for NeoVista. And every time the men corresponded,
 10 Hendrick subtly, but no less effectively, linked the NeoVista connection to the Peregrine deal
 11 through Hendrick's e-mail address: the day before Mr. Wang signed the Note, Hendrick wrote to
 12 Mr. Wang to discuss "finaliz[ing]" the deal, signing the e-mail as NeoVista president and CEO.
 13 *See* Wang Decl. ¶ 14, Ex. 3 at PW000982.

14 Cubic points to e-mail statements indicating that Hendrick told Mr. Wang that
 15 manufacturing of the NeoVista project "is a separate arrangement from Peregrine," that Mr.
 16 Wang's attorney questioned the relationship of Peregrine to NeoVista, and that Peregrine's
 17 counsel told Mr. Wang and his attorney that "[w]e think the China deal is a separate deal with
 18 NeoVista." Cubic Mot. at 11. Cubic contends that these assertions override any other
 19 representations that Hendrick made to Mr. Wang, and that it was not reasonable for Mr. Wang to
 20 rely on Hendrick's statements about NeoVista projects. *See id.*

21 But a reasonable jury could find that Hendrick, on a mission for Peregrine, purposely and
 22 improperly muddled the waters to induce Mr. Wang to invest. Moreover, Mr. Wang reasonably
 23 could believe that he was investing in Peregrine on the condition that he was also getting the
 24 NeoVista deal. Why would he not believe this? Hendrick told him repeatedly how excited they
 25 were to help Mr. Wang begin manufacturing the NeoVista product in China—"free of charge,"
 26 meaning of course, in exchange for his investment in Peregrine.⁵ On top of those promises, there

27 _____
 28 ⁵ A jury surely would consider it likely that Hendrick would make such an offer only to someone
 on the brink of investing a sizable amount of money into his failing company. Why else would a

1 remains Mr. Wang’s persistent assertion—before negotiations began, while talks continued, and
 2 throughout this litigation—that he understood that he was getting a package deal in exchange for
 3 his \$500,000. Thus, a jury could still reasonably find that Peregrine led Mr. Wang into believing
 4 that what might appear to be two “separate” agreements were nonetheless contingent upon each
 5 other.

6 Moreover, even simple deals often involve multiple, related, but “separate” agreements.
 7 As an illustration, consider Cubic’s own insufficiently evidenced effort to prove that it is the Note
 8 holder. That argument depends on four “separate” but apparently related agreements. Likewise,
 9 Cubic seeks to shoehorn the integration clause of the Stock Purchase Agreement onto the Note
 10 itself, arguing in essence that the documents contemplated each other. It happens all the time, and
 11 Mr. Wang was reasonable in believing that his Note to Peregrine was just a piece of the more
 12 comprehensive agreement Hendrick led him to believe he was making. Specifically, Hendrick
 13 promised that, as a result of Mr. Wang’s involvement in Peregrine, Mr. Wang would also be
 14 getting the NeoVista project in China. And it is obvious that Mr. Wang believed this before,
 15 during, and after the events giving rise to this case. Secure in the understanding of Hendrick’s
 16 and Peregrine’s promises, Mr. Wang signed the Note expecting it to be the first of several
 17 agreements he needed to sign. Many more agreements did follow—but none had anything to do
 18 with granting Mr. Wang licenses to produce and market products in China. He did not get what
 19 Peregrine and Hendrick promised.

20 Mr. Wang acknowledges that the Note does not specifically mention the deal that Mr.
 21 Wang thought he was getting. But Foster, and Hendrick, whom he deeply trusted, were pressing
 22 Mr. Wang to sign the Note on a tight deadline, away from his attorney, and at a dinner-time
 23 setting. Mr. Wang felt rushed and had little time to read closely—a task in any event that was
 24 rendered more difficult by Mr. Wang’s failure to bring his glasses. *See Wang Dep.* at 29:2-8.
 25 Besides, Mr. Wang thought, why would Hendrick go back on his word? The choice here,
 26 compared to a simple signing at an office, *followed* by a celebratory dinner, makes Peregrine’s

27
 28 man busy running two companies offer to do anything “free of charge”?

1 conduct all the more questionable. Cubic has failed to establish that no reasonable jury could
 2 agree. Accordingly, the Court should deny Cubic's Motion for Summary Judgment.

3 **2. Peregrine Actively Concealed the Material Fact of Its Poor Financial**
 4 **Health.**

5 "In addition to arising from overt misrepresentations, fraud also may occur through
 6 deliberate concealment of material facts, or by silence in the face of a duty to speak." *Vichi*, 85
 7 A.3d at 773-74. Moreover, fraud based on "active concealment does not require a showing that
 8 the defendant had a pre-existing duty to speak." *Transdigm Inc. v. Alcoa Global Fasteners, Inc.*,
 9 No. 7135-VCP, 2013 WL 2326881, at *6 (Del. Ch. May 29, 2013).

10 In *In re Nine Systems Corporation Shareholders Litigation*, for example, the Chancery
 11 Court of Delaware held that a group of plaintiffs had sufficiently pleaded fraud by active
 12 concealment in a case similar to Mr. Wang's. *See* No. 3940-VCN, 2013 WL 4013306, at *2 (Del.
 13 Ch. July 31, 2013). In particular, the plaintiffs alleged that an investor considering whether to sell
 14 shares in a corporation back to the company had "specifically asked" company officers "for an
 15 update on the Corporation's activities and business prospects." *Id.* The corporate officers
 16 responded with some information but "did not mention" that the company was negotiating a
 17 potential merger. *Id.* They also suggested to the investor that a particular buyback price was "fair
 18 under the circumstances." *Id.* The investor claimed, after the true facts came out, that he would
 19 not have sold his shares back to the company for the price he did had the corporate officers
 20 revealed the material fact of the merger talks. *Id.*

21 While *Nine Systems* considered the sufficiency of the pleadings, rather than the
 22 sufficiency of the evidence on a motion for summary judgment, it remains instructive. Mr. Wang
 23 has produced sufficient evidence to support a jury finding that he likewise had specifically asked
 24 Hendrick and Foster for information on Peregrine's business prospects. *See* Wang Decl. ¶ 12, Ex.
 25 1 at PW000025-26. On October 2, 2011, for example, Mr. Wang asked Hendrick for copies of
 26 Peregrine's agreement with Hewlett-Packard, other agreements, and "information regarding
 27 outstanding stock and funds committed." *See id.* In light of Mr. Wang's established difficulty
 28 communicating in English (especially in writing), Hendrick and Foster surely knew that Mr.

1 Wang sought information about the company's viability. Hendrick responded to this request,
 2 before launching into a discussion about NeoVista, by promising that Foster, the attorney, would
 3 send a copy of the HP agreement and information about the potential Qualcomm deal. *See id.*
 4 But despite Mr. Wang's request, neither Hendrick, Foster, nor anyone else at Peregrine ever sent
 5 Mr. Wang the most obvious status reports—the Investor Updates that painted a more accurate
 6 and clear picture of where the company stood. *See Id.* at PW000024-26.

7 Specifically, no one ever told Mr. Wang, as Peregrine had previously told its existing
 8 investors, that the company had been one day away from closing—"due to insolvency"—just
 9 seven months before. *See Petersen Decl.* ¶ 3, Ex. 1 at Cubic001440. And no one told him that, at
 10 that same time, "despite having aggressively solicited commercial loans nationwide, Peregrine
 11 has been rejected as not meeting current commercial lending requirements." *Id.* at Cubic001443.

12 Instead, Hendrick and Foster gave Mr. Wang one-sided information about the company's
 13 prospects—for example, sending public-relations materials about partnerships with Hewlett-
 14 Packard, while actively obscuring, in the face of requests for business information, the fact that
 15 Peregrine continually was in danger of collapsing. *See Wang Decl.* ¶ 12, Ex. 1 at PW000024-26.
 16 Worse, Foster explicitly told Mr. Wang and his counsel that "Peregrine investors have also
 17 committed to funding or obtaining" the money needed to keep Qualcomm from seizing Peregrine
 18 under the terms of the Qualcomm loan. *See id.* at PW000022. Hendrick made the same
 19 representation to Mr. Wang. *See Wang Dep.* at 122:18-123:6. But it was not true. Five days
 20 after that representation to Mr. Wang, the Peregrine Board of Directors sent another Investor
 21 Update asking for the money it told Mr. Wang it had already collected. *Petersen Decl.* ¶ 3, Ex. 4
 22 at Cubic000977.

23 In particular, the October 9, 2011, Investor Update explained that Peregrine had "firm
 24 commitments or actual funds . . . for about \$75,000" of half a million dollars, and it needed to
 25 raise the remainder within one week. *Id.* And that was just a part of the money Peregrine needed
 26 to raise to keep Qualcomm from seizing Peregrine stock: as the Board explained, Peregrine "still
 27 need[s] to raise an additional \$1.2M by November 30th[.]" *Id.* In other words, Peregrine needed
 28 to raise more than \$1.6 million in about six weeks to avoid defaulting on its loan to Qualcomm.

1 That is materially different than the “commitment” about which Foster and Hendrick told Mr.
 2 Wang. Mr. Wang never knew that Peregrine investors had not committed actual cash to satisfy
 3 the Qualcomm loan terms, because no one at Peregrine told him or corrected the false information
 4 that Foster gave him.⁶ Even assuming that the prior statements about Peregrine investors’ level of
 5 funding were true on October 5, 2011, when Foster made them, they clearly were not true on
 6 October 9, 2011, when Peregrine issued the Investor Update. Mr. Wang had not yet signed the
 7 Note.

8 Because these prior statements gave Mr. Wang the impression that Peregrine investors had
 9 fully funded what was needed to satisfy Qualcomm’s loan terms, Foster and Hendrick “assumed a
 10 duty to update [his] statement to the extent that subsequent events rendered [his] representation
 11 materially misleading.” *See In re Wayport, Inc. Litig.*, 76 A.3d 296, 324 (Del. Ch. 2013) (citing
 12 Restatement of Torts § 551). Neither Foster nor Hendrick updated his statement. Once they
 13 knew that it was no longer true—if it ever had been true—their silence in the face of that duty
 14 “placed [them] in the same position as if [they] knowingly made a false representation in the first
 15 instance.” *Id.*

16 As Mr. Wang has explained, and as a jury potentially could agree, Peregrine officials,
 17 despite their obvious knowledge of the perilous condition of their company, continued to
 18 represent that the investment would provide “good value of a share, [a] good deal” while
 19 withholding critical information that Mr. Wang sought and that would have led him to conclude
 20 that the offer to invest was not worth the risk. Wang Dep. at 17:18-19; Wang Decl. ¶¶ 26-27.
 21 Because disputed issues of fact remain about whether Peregrine defrauded Mr. Wang by
 22 withholding material information it should have provided, the Court should deny Cubic’s Motion.

23 //

24 //

25
 26 ⁶ Mr. Wang anticipates that Cubic will argue that Mr. Wang could not reasonably rely on Foster’s
 27 statement about Peregrine’s existing investors’ commitment, because just below that assertion,
 28 Mr. Wang’s counsel explained that something in that response was “far from certain.” *See* Wang
 Decl. ¶ 12, Ex. 1 at PW000022. But that comment applied to the assertion that “the company will
 be likely to obtain bank financing as result of all of the foregoing statements of fact. *See id.*

1 **VI. CONCLUSION**

2 Cubic alleges, but has not proved, that Mr. Wang owes it money arising from a Note Mr.
3 Wang was tricked into signing. Because genuine disputes still exist as to these material issues,
4 the Court must deny Cubic's motion.

5 Dated: June 30, 2015

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